IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

TUESDAY, THE 6TH MARCH 2007 / 15TH PHALGUNA 1928

OP.No. 12139 of 2001(I)

PETITIONER:

T.K.SHAHAL H. MUSALIAR,
S/O.LATE A. THANGAL KUNJU MUSALIAR,
BELAIRE, KILIKOLLOOR,
QUILON 691 004.

BY ADV. SRI.V.RAMACHANDRAN(SR)
SRI.HARUN-AL-RASHID
SRI.P.K.MUHAMMED

RESPONDENTS:
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1. **COMMISSIONER OF INCOME TAX,**
   TRIVANDRUM.

2. **INCOME TAX OFFICER, A WARD, QUILON.**

BY ADV. SRI.P.K.R.MENON(SR.),SC FOR IT
SRI.GEORGE K. GEORGE, SC FOR IT

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 06/03/2007, ALONG WITH OP NO. 12259 OF 2001 OP NO. 12153 OF 2001 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP. NO.19479/2001 IN OP. NO.12139/2001

DISMISSED

06.03.2007 **SD/- C.N.RAMACHANDRAN NAIR, JUDGE**

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE ORDER OF THE MINISTRY OF FINANCE IN NO.74(8)/(29) IP 57, DT.25TH SEPTEMBER , 1957.

EXT.P2:- COPY OF THE LETTER FROM THE COMMISSIONER OF INCOME TAX C.NO.661-25(1)/57, DT.12TH NOVEMBER 1957.

EXT.P3:- COPY OF THE CERTIFICATE SHOWING DEMANDS NO.12 TO 22 IN RE: PENALTY U/S. 221 ASST.YEAR 1950-51 & 51-52, PENALTY U/S 28(1) (C) ASST.YEAR 1953-53, INTEREST U/S 18A(9) , ASST.YEAR 1952-53, PENALTY U/S 41 (1) © OF THE INCOME TAX ACT; ASST.YEAR 1122, 1123,1124 (M.E.)

EXT.P4:- COPY OF THE NOTICE IN FORM I.T.C. P.17 ISSUED BY THE TAX RECOVERY OFFICER, DT.18TH JUNE 1976 T.R. NO.25/58.

EXT.P5:- COPY OF THE PENALTY ORDERS UNDER SEC. 28(1) © A.Y. 1950-51, AND 1951-52 AND PENALTY UNDER SEC. 28 (1) (b) FOR A.Y 1952-53.

EXT.P6:- COPY OF THE WAIVER PETITIONERS FILED BEFORE THE COMMISSIONER OF INCOME TAX, TRIVANDRUM UNDER SEC. 28 (1) © A.Y. 1950, 51 51-52 AND UNDER SEC. 28 (1)(b) A.Y. 1952-63.

EXT.P7:- COPY OF THE ORDERS OF THE COMMISSIONER OF INCOME TAX.

/TRUE COPY/

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C.N.RAMACHANDRAN NAIR,J.

O.P. NOs.12139, 12153 & 12259 OF 2001

Dated this the 6th day of March, 2007

JUDGMENT

The common petitioner in the three connected cases as legal heir of the deceased A. Thangal Kunju Musaliar is challenging penalty levied under Section 41(1)(c) of the Travancore Income Tax Act for the assessment years 1950-51 and 1951-52 and the penalty levied under Section 28(1)(c) and Section 18A (9) of the Income Tax Act, 1922 for the assessment year 1952-53.

2. The assessee died in February, 1966. However, prior to his death, the assessee has gone for two settlements with the department. In fact the demands of income tax were raised based on settlement and according to counsel for the petitioner, the total tax payment exceeds total tax liability and petitioner and other legal heirs of late assessee are entitled to refund. However, penalty levied for the above three years and confirmed in revisions are still outstanding.

3. I have heard Senior Counsel Sri. V. Ramachandran who appeared for the petitioner along with Sri. Harun-Al-Rashid and Sri.

P.K.R. Menon, senior standing counsel appearing for the respsondents. Both sides have furnished argument notes and I have gone through the same also.

4. The main ground of challenge against levy of penalty is that it is against settlement arrived at between the assessee and the department whereunder the department agreed not to levy any penalty or launch prosecution. Even though counsel for the petitioner contended that the Department is barred from violating the terms of settlement, standing counsel for the respondents submitted that assessee and his legal heirs did not remit the tax in terms of settlement, and therefore terms of settlement are not binding on the department. I find that the Commissioner of Income tax in the revision petitions has considered this objection. He has in fact relied on earlier judgment of this Court in the same matter in the Writ Petitions filed by some other legal heirs of the assessee whereunder this Court held as follows:

> We are not satisfied with by reason of Ext. D2 settlement the revenue is precluded from recovering arrears of income-tax due for the period covered by the settlement under the provisions of the Income-tax Act, 1961. As the terms of the settlement binding on

> the assessee have been broken by him, the revenue cannot be held to be bound by the terms of the settlement binding on them.

From the above, it is clear that the issue stands settled by decision of this Court and this Court gave a clear-cut finding that since assessee and his legal heirs failed to comply with the terms of settlement, department is not bound by the settlement. In the circumstances, levy of penalty is tenable as the assessee during his life-time and his legal heirs thereafter failed to settle the arrears of tax in terms of settlement but made payments only after decades of settlement and that too in coercive proceedings.

5. The next ground of challenge is that assessee was sick and bed -ridden and consequently he was not in a position to receive notice and effectively represent against levy of penalty. On facts, the Commissioner clearly found that penalty was levied after issuing detailed notice and after giving opportunity to the late assessee. I do not think petitioner as legal heir is entitled to contest penalty on the ground that assessee was not heard which case the assessee did not have during his lifetime. In fact, on going through the penalty orders, I

find penalty itself is levied based on additional income conceded by the assessee in settlement proceedings after department conclusively established escapement of income based on which assessments were made. Therefore the challenge against levy of penalty on the ground of violation of natural justice is not tenable.

6. The next ground of challenge is on limitation. Counsel for the petitioner relied on the decision of the Supreme Court in UPADHYAYA V. SHANABHAI P. PATEL, (1987) 166 ITR 163 and contended that there is inordinate delay in completion of penalty proceedings for the relevant assessment years and therefore levy of penalty is arbitrary, and barred by limitation. I am unable to accept this contention for the reason that no time bar is provided under the Travancore Income Tax Act or under the Income Tax Act, 1922 for levy of penalty for concealment of income. Moreover, the enquiry conducted, detection of massive suppressed income, dispute in assessment through appeal, and final settlement was based on additional income offered by the late assessee would show beyond doubt that penalty proceedings originally initiated had to wait till

finalisation of assessments based on which penalty is ultimately levied. Therefore it cannot be said that time taken for completion of penalty proceedings is so unreasonable to affect its validity. Therefore the challenge against penalty proceedings on the ground of limitation is also rejected.

7. The last ground of challenge is against the merits of the case. Senior counsel for the petitioner pointed out that onus of proof of concealment of income is on the department and until amendment was introduced in the 1961 Act in Section 271 (1) (c) of the Act, no penalty could be levied under Section 41(1)(c) of the Travancore Income Tax Act or Section 28(1)(c) of the Income Tax Act, 1922 without establishing *mens rea.* He has relied on the decisions of the Supreme Court in ANANTHARAM VEERASINGHAIAH & CO. V. COMMISSIONER OF INCOME TAX, A.P., (1980) 123 I.T.R. 457, COMMISSIONER OF INCOME TAX, MADRAS V. KHODAY ESWARSA AND SONS, (1972) 83 I.T.R. 369 and COMMISSIONER OF INCOME TAX V. ANWAR ALI, (1970) 76 ITR 696 and contended that without establishing *mens rea* Department is not entitled

to levy penalty for concealment of income whether it be under the Travancore Income Tax Act or under the Income Tax Act, 1922. Counsel for the Department on the other hand has relied on the decisions of the Madras High Court in ARUNACHALAM CHETTIAR V. COMMISSIONER OF INCOME TAX, 6 ITC 58 and COMMISSIONER OF INCOME TAX, MADRAS V. J.K.A. SUBRAMANYA CHETTIAR, 110 ITR 602 and that of this Court in COMMISSIONER OF INCOME TAX, KERALA II, ERNAKULAM V. K. MAHIM, 149 ITR 737, and contended that concealment is self-evident from the facts disclosed in the impugned orders and penalty is perfectly justified. On going through the impugned orders, particularly the order in revision, I find that facts prove beyond doubt that assessee had concealed income details of which were collected by the department. In fact settlement itself was reached only because the department got evidence about details of concealment. It is seen that for the assessment year 1950-51 (1122 ME), the original return filed by the assessee disclosed income of Rs. 7864/-. However, assessment was completed at Rs. 1,05,631/- which was later revised to Rs. 2,05,663/-.

It is to be noted that the suppressed income represents interest on Govt. securities, fixed deposits, etc. The assessee himself later filed revised return disclosing an income of Rs. 1,75,997/- as against original income returned of Rs. 7864/-. The total income assessed for 1950-51 in terms of settlement was Rs. 14,42,098/-. It is seen that penalty levied under Section 41(1)(c) for this year was only Rs. 40, 754/- and that too only when the assessee and his legal heirs failed to settle liability in terms of the settlement. Therefore I do not find any ground to interfere with the penalty levied for 1950-51. For the year 1951-52 (1123 ME) the late assessee returned income of Rs. 34,236/- and the original assessment completed was on an income of Rs. 91,242/-. The assessment was revised under Section 47 of the Travancore Income Tax Act because the assessee did not include his share income from a private limited company under his control, that is M/s. A. Thangal Kunju Musaliar and Sons (P) Ltd. On reassessment, the income was redetermined at Rs. 3,30,175/- which was confirmed in appeal by the Tribunal. The assessment was ultimately settled at enhanced income of Rs.10,22,339/- . In view of massive concealment of income, which

was conceded by late assessee himself by filing a revised return at Rs. 1,92,742/- and later assessed at Rs. 10,22,339/- in settlement, the assessee was levied a penalty of Rs. 5,70,814/- under Section 41(1)(c) of the Travancore Income tax Act. The facts disclose clear suppression of income and without any justification the assessee did not include his share income from a private limited company which was under his control. The penalty levied is only a minimum penalty and therefore there is no scope for interference with the penalty levied for the year 1951-52 also. So far as the penalty levied for the year 1952-53 is concerned, it is seen that original income returned by the late assessee was Rs. 17,066/- and assessment was completed on an income of Rs. 2,15,468/-. This assessment was again revised under Section 47 of the Act fixing the income at Rs. 5,18,968/- against the income conceded by the assessee in revised return at Rs. 1,61,646/-. The income assessed under the settlement was Rs. 5,18,968/- and the penalty levied for concealment of income was Rs.2,12,135/-. Here again I do not find any scope for interference with the levy of minimum penalty for admitted concealment of income by the late assessee.

The last contention raised is only with regard to reduction of penalty. However, in view of settlement and payment of tax, instead of reducing the penalty, it would be more beneficial to the assessee to completely waive the interest, which will otherwise run to lakhs of rupees for non-payment of penalty for several decades. However such relief can be granted as in settlement only if the petitioner and other legal heirs of the assessee pay the penalty within a reasonable time. Even though along with argument notes the petitioner has produced an order of the Chief Commissioner of Income tax dated 5.1.2000, waiving interest under Section 220(2A) of the Act on the penalty amount, it is conceded that petitioner has not paid penalty and consequently waiver of interest is not relevant or valid as of now. In any case in order to give quietus to the issue, which is pending for decades, I order complete waiver of interest if the entire arrears of penalty is paid at least on or before 30.4.2007. The assessing officer is directed to consider payments of tax made by the petitioner and other legal heirs of late assessee and if any excess is there, the same will be adjusted towards penalty and balance only will be payable by the

petitioner and other legal heirs, for which a statement will be given by the assessing officer within two weeks from the date of production of a copy of this judgement.

OPs are disposed of as above.

(C.N.RAMACHANDRAN NAIR)
Judge